FILE COPY

Office Supreme Court,
FILED
AUG 12 193
CHARLES ELMORE CR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 360

PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

vs.

ILLINOIS BRICK COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, AND BRIEF IN SUPPORT THEREOF.

FREDERIC D. MCKENNEY,
FRANK J. LOESCH,
EDWARD M. BURKE,
Counsel for Petitioner.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

INDEX.

	Page
Petition:	
Caption	1
Judgment Below	1
Summary Statement of the Matter Involved	2-22
Questions Presented	2
Statutes Involved	5
Statement	9
Rulings of the Courts Below	19
Reasons for Granting Petition	23
Conclusion	26
Brief:	
Opinion Below	27
Jurisdiction	28
The Facts	36
Argument	37-48
I. Illinois Commerce Commission had no power to award reparation on rates established pursuant to order of Interstate Commerce Commission	37
II. Illinois Commerce Commission had no power to award reparation on rates previously authorized by it	41
III. The rate fixed by the order here involved is confiscatory	43
IV. The state court has denied petitioner an opportunity to be heard on the merits of the case and has therefore denied petitioner due process of law	45
Conclusion	48
Appendix	49

Cases Cited.

American Express Company v. So. Dakota, ex rel. Caldwell, 244 U. S. 617, 61 L. Ed. 1352, 37 S. Ct. 656. 38

Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co., 284 U. S. 370; 76 L. Ed. 348, 52 S. Ct. 183... 41

Atchison, Topeka & Santa Fe Ry. Co. v. Robinson, 233 U. S. 173, 58 L. Ed. 901, 34 S. Ct. 556..... 30

Atlantic Coast Line R. R. Co. v. Florida, ... U. S. ...., 79 L. Ed. (Adv.) 719, 55 S. Ct. 713..... 40

Bridge Proprietors v. Hoboken L. & I. Co., 68 U. S. (1 Wall.) 116, 17 L. Ed. 571..... 33

Brimstone Railroad & Canal Co. v. United States, 276 U. S. 104, 72 L. Ed. 487, 48 S. Ct. 282..... 43

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 74 L. Ed. 1107, 50 S. Ct. 451.....25, 35, 47

Chesapeake & Ohio Ry. Co. v. Mihas, 280 U. S. 102, 74 L. Ed. 207, 50 S. Ct. 42..... 29

Chicago, Rock Island & Pacific Ry. Co. v. People, 217 Ill. 164, 75 N. E. 368..... 34

Columbia Water Power Co. v. Columbia Electric Street R. L. & P. Co., 172 U. S. 475, 43 L. Ed. 521, 19 S. Ct. 247 31

Consolidated Coal Co. v. Illinois, 185 U. S. 203, 46 L. Ed. 872, 22 S. Ct. 616..... 33

Eagle Cotton Oil Co. v. Southern Railway Co., 46 Fed. (2d) 1006, reversed 51 Fed. (2d) 443, certiorari denied 284 U. S. 675, 76 L. Ed. 571, 52 S. Ct. 130..40, 42, 43

First National Bank v. Anderson, 269 U. S. 341, 70 L. Ed. 295, 46 S. Ct. 135..... 31

Furman v. Nichol, 75 U. S. (8 Wall.) 44, 19 L. Ed. 370 33

Great Northern Ry. Co. v. Sunburst Oil and Refining Co., 287 U. S. 358, 77 L. Ed. 360, 53 S. Ct. 145.....41, 43

Hunter v. Troup, 226 Ill. App. 343..... 29

Illinois Central Railroad Co. v. Public Utilities Commission of Illinois, 245 U. S. 493, 62 L. Ed. 425, 38 S. Ct. 170..... 38

Live Oak Water Users' Assn. v. Railroad Commission, 269 U. S. 354, 70 L. Ed. 305, 46 S. Ct. 149..... 31

Louisville & Nashville Railroad Co. v. Melton, 218 U. S. 36, 54 L. Ed. 921, 30 S. Ct. 676..... 34

Moses v. Royal Indemnity Co., 276 Ill. 177, 114 N. E. 554..... 32

New York v. United States, 257 U. S. 591, 66 L. Ed. 385, 42 S. Ct. 239..... 39

New York Central Railroad Co. v. New York & Pennsylvania Co., 271 U. S. 124, 70 L. Ed. 865, 46 S. Ct. 447.....36, 47

Northern Pacific Ry. Co. v. Department of Public Works of Washington, 268 U. S. 39, 69 L. Ed. 836, 45 S. Ct. 412.....24, 44

Northern Pacific Ry. Co. v. North Dakota ex rel. McCue, 236 U. S. 585, 59 L. Ed. 735, 35 S. Ct. 429... 44

Pearson v. Zehr, 125 Ill. 573, 18 N. E. 204..... 34

People v. Eisen, 357 Ill. 105, 191 N. E. 219..... 34

Prudential Insurance Co. v. Cheek, 259 U. S. 530, 66 L. Ed. 1044, 42 S. Ct. 516..... 31

Railroad Commission of Wisconsin v. Chicago, Burlington and Quincy R. R. Co., 257 U. S. 563, 66 L. Ed. 371, 42 S. Ct. 232.....23, 37, 39

Shepherd v. City of Sullivan, 166 Ill. 78, 46 N. E. 720.. 34

Terminal Railroad Assn. of St. Louis v. The Public Utilities Commission, 304 Ill. 312, 136 N. E. 797.25, 45, 46

United States v. Louisiana, 290 U. S. 70, 78 L. Ed. 181, 54 S. Ct. 28 38

Vandalia Railroad Co. v. Schnull, 255 U. S. 113, 65 L. Ed. 539, 41 S. Ct. 324 44

Van Dyke v. Illinois Commercial Men's Assn., 358 Ill. 458, 193 N. E. 490 34

Waite v. Dowley, 94 U. S. (4 Otto) 527, 24 L. Ed. 181 .. 32

Woodruff v. Kellyville Coal Co., 182 Ill. 480, 55 N. E. 550 34

INTERSTATE COMMERCE COMMISSION AND ILLINOIS COMMERCE COMMISSION ORDERS CITED.

Ex Parte 74 (Increased Rates, 1920), 58 Int. Com. Rep. 220 (July 29, 1920) (R. 281-300), 58 Int. Com. Rep. 302 (Aug. 11, 1920) 2, 12, 13, 18, 21, 23, 38, 42, 43

Re Intrastate Rates Within the State of Illinois, Docket 11703, 60 Int. Com. Rep. 92 (Jan. 11 1921) (R. 218-236) 12, 13, 18, 21, 23, 29, 30, 32, 37, 38

Illinois Brick Company v. Director General, as Agent, Pennsylvania Railroad, Western Lines, et al., Docket 11317, 64 Int. Com. Rep. 273 (Oct. 27, 1921) (R. 116-129) 13, 14, 18, 21

Re Petition of the Carriers in the State of Illinois Relative to Increased Freight Rates to Conform to Advances Allowed by the Interstate Commerce Commission, No. 10620, 7 Illinois Public Utilities Commission Reports 1047 (Aug. 10, 1920) (R. 210-217), 8 Illinois Public Utilities Commission Reports, 31, (Oct. 18, 1920) 12, 18, 21, 33, 42

Constitutional Provisions Cited.

Third paragraph of Section 8, Article I, of the Constitution of the United States...2, 3, 19, 22, 23, 24, 32, 35, 50

Section 1 of the Fourteenth Amendment to the Constitution of the United States.3, 4, 19, 22, 24, 33, 34, 35, 49, 50

Statutes Cited.

Judicial Code, Section 237 (b), as amended by Act of Feb. 13, 1925, c. 229 (43 Stat. 937 [28 U. S. C. A. Sec. 344]) 28, 31

Interstate Commerce Act, Section 13 (4), as amended by Transportation Act, 1920, c. 91, Sec. 416 (41 Stat. 484 [49 U. S. C. A. Sec. 13 (4)]).....2, 5, 23, 30, 37, 38

Interstate Commerce Act, Section 15a (2), as amended by Transportation Act, 1920, c. 91, Sec. 422 (41 Stat. 488 [49 U. S. C. A. Sec. 15a (2)]).....2, 5, 23, 30, 38

Transportation Act, 1920, Section 208a, c. 91, (41 Stat. 464 [Fed. Stat. Ann., Supp. 1920, page 80]).2, 3, 6, 23, 42

An Act Concerning Public Utilities, Section 68 (Laws of Illinois, 52d General Assembly, 1921, page 742 [Cahill's Illinois Statutes, 1923, Chap. 111a, Sec. 87, Smith-Hurd Illinois Statutes, 1923, Chap. 111-2/3, Sec. 72]) 4, 6, 20, 22, 28, 35, 45, 46, 49, 50

An Act Concerning Public Utilities, Section 72 (Laws of Illinois, 52d General Assembly, 1921, page 745 [Cahill's Illinois Statutes, 1923, Chap. 111a, Sec. 91, Smith-Hurd Illinois Statutes, 1923, Chap. 111-2/3, Sec. 76]) 7, 17, 28

An Act in Relation to Practice and Procedure in Courts of Record, Section 118, in force July 1, 1907, as amended (Laws of Illinois, 45th General Assembly, 1907, page 467 [Cahill's Illinois Statutes, 1931, Chap. 110, Sec. 118, Smith-Hurd Illinois Statutes, 1931, Chap. 110, Sec. 118]) 8, 19, 21

An Act in Relation to Practice and Procedure in Courts of Record, Section 121, in force July 1, 1907, as amended by Act of June 21, 1929 (Laws of Illinois, 45th General Assembly, 1907, page 468; Laws of Illinois, 56th General Assembly, 1929, page 578 [Cahill's Illinois Statutes, 1931, Chap. 110, Sec. 120, Smith-Hurd Illinois Statutes, 1931, Chap. 110, Sec. 120]) 8, 21, 22, 29

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No.

PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

vs.

ILLINOIS BRICK COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

MAY IT PLEASE THE COURT:

Pennsylvania Railroad Company prays that a writ of certiorari issue to review the judgment of the Appellate Court of the State of Illinois, First District, entered in the above entitled cause on December 24, A. D. 1934. (R. 306).

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Questions Presented.

1. Whether the Illinois Commerce Commission has the power, under Sections 13 and 15a of the Interstate Commerce Act (49 U. S. C. A., Sections 13 and 15a), under Section 208a of the Transportation Act, 1920, and under the provision of Section 8 of Article I of the Constitution of the United States giving exclusive authority to Congress over interstate commerce, to award reparation in favor of a shipper and against a railroad in the following circumstances: Said railroad was engaged in interstate and intrastate commerce. Reparation was awarded on account of alleged unreasonable and discriminatory charges for shipments of common brick in intrastate commerce in Illinois between October 28, 1920, and February 15, 1922. The United States Railroad Administration had established a specific rate on brick during Federal control. Said rate was continued in effect by Section 208a of the Transportation Act, 1920. Part of the rates here in question were established pursuant to a mandatory general order of the Interstate Commerce Commission requiring said railroad to establish intrastate rates in Illinois on all commodities equal to the interstate rates on all commodities theretofore established by the Interstate Commerce Commission in *Ex Parte* 74, a proceeding authorizing increase of such interstate rates by a certain percentage. The rate established by the Illinois Commerce Commission in the reparation proceeding was not only lower than the rates established pursuant to the said mandatory order of the Interstate Commerce Commission, but was also lower than the above mentioned specific rate on brick prescribed by

the Railroad Administration, which was continued in force by said Section 208a.

2. Whether an award of reparation by the Illinois Commerce Commission denied petitioner due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, and imposed an unlawful burden on interstate commerce, in violation of Section 8 of Article I of the Constitution of the United States, in the following circumstances: Said railroad was engaged in interstate and intrastate commerce. Reparation was awarded on account of alleged unreasonable and discriminatory charges for shipments of common brick in intrastate commerce in Illinois between October 28, 1920, and February 15, 1922. The United States Railroad Administration had established a specific rate on brick during Federal control. Said rate was continued in effect by Section 208a of the Transportation Act, 1920, and part of the rates here in question were established pursuant to orders of the Illinois Public Utilities Commission authorizing said railroad to increase its rates on all commodities in Illinois by certain percentages. The rates established by the Illinois Commerce Commission (successor to Illinois Public Utilities Commission) in the reparation proceeding were not only lower than the rates authorized by said percentage increases, but were also lower than the specific rate on brick prescribed by the Railroad Administration and continued in force by said Section 208a. This question must be considered in the light of the fact that there were no decisions in the Illinois courts prior to the present proceedings giving the Illinois Commerce Commission such power to award reparation on an approved rate.

3. Whether an order of the Illinois Commerce Commission awarding reparation to respondent against petitioner on account of alleged unreasonable and discriminatory charges for intrastate shipments of freight, denies peti-

tioner due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, when said order thus retroactively establishes a rate for such shipments which is less than petitioner's cost of moving such shipments, as shown by the undisputed evidence before said Commission.

4. Whether petitioner has been deprived of its property without due process of law in violation of the Fourteenth Amendment to the United States Constitution, because it was deprived of an opportunity to be heard on the merits in this case by the state court, in the following circumstances: Prior to the hearing before the Illinois Commerce Commission in this case, the Illinois Supreme Court had held that Section 68 of the Illinois Public Utilities Act (Cahill's Illinois Statutes, Chapter 111a, Section 87; Smith-Hurd Illinois Statutes, Chapter 111⅔, Section 72) did not permit an appeal to the courts by a carrier from an order of the Illinois Public Utilities Commission awarding reparation against said carrier, because such award was not a final order, but was open to inquiry in a subsequent suit on the award. Consequently petitioner did not attempt to appeal either from the order of the Illinois Commerce Commission entered November 7, 1923, in this case, finding that certain rates would have been reasonable and that reparation should be awarded, nor from the order entered April 16, 1924, awarding reparation. After the time for appeal had expired, respondent sued on the award and obtained judgment in the trial court. Petitioner appealed, and on appeal respondent contended for the first time that petitioner should have appealed from said order entered November 7, 1923, by said Commission. The Appellate Court of Illinois sustained this contention, and held that under said Section 68 petitioner, by failing to appeal, had waived the right to be heard in court as to the sufficiency of the evidence before the Commission, or its findings. The

Supreme Court of Illinois, by denial of certiorari, in effect approved the Appellate Court's holding.

Statutes Involved.

Section 13 (4) of Interstate Commerce Act, as amended by Transportation Act, 1920, c. 91, Section 416 (41 Stat. 484 [49 U. S. C. A. Section 13, Paragraph (4)]):

> "*Duty of commission where State regulations result in discrimination.* Whenever in any such investigation the commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

Section 15a (2) of Interstate Commerce Act, as amended by Transportation Act, 1920, c. 91, Section 422 (41 Stat. 488 [49 U. S. C. A. Section 15a (2)]):

> "*Rates to Permit Carriers to Earn Fair Return.* In the exercise of its power to prescribe just and reasonable rates the commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate

annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided,* That the commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different portions of the country."

Section 208a of Transportation Act, 1920, c. 91 (41 Stat. 464 [Fed. Stat. Ann., Supp. 1920, page 80]):

"All rates, fares, and charges, and all classifications, regulations, and practices, in any wise changing, affecting, or determining, any part or the aggregate of rates, fares, or charges, or the value of the service rendered, which on February 29, 1920, are in effect on the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect until thereafter changed by State or Federal authority, respectively, or pursuant to authority of law; but prior to September 1, 1920, no such rate, fare, or charge shall be reduced, and no such classification, regulation, or practice shall be changed in such manner as to reduce any such rate, fare, or charge, unless such reduction or change is approved by the Commission."

Section 68 of "An Act Concerning Public Utilities," (Laws of Illinois, 52d General Assembly, 1921, page 742 [Cahill's Illinois Statutes, 1923, chapter 111a, section 87; Smith-Hurd Illinois Statutes, 1923, chapter 111-2/3, section 72]). Said section is in part as follows:

"Within thirty days after the service of any order or decision of the Commission refusing an application for a rehearing of any rule, regulation, order or decision of the Commission, or within thirty days after the service of any final order or decision of the Commission upon and after a rehearing on any rule, regulation, order or decision of the Commission, any person or corporation affected by such rule, regulation, order or decision, may appeal to the circuit or superior court of the county in which the subject-matter of the hearing is situated, * * *

"When no appeal is taken from a rule, regulation, order or decision of the Commission, as herein pro-

vided, parties affected by such rule, regulation, order or decision, shall be deemed to have waived the right to have the merits of said controversy reviewed by a court and there shall be no trial of the merits of any controversy in which such rule, regulation, order or decision was made, by any court to which application may be made for a writ to enforce the same, or in any other judicial proceeding."

Section 72 of "An Act Concerning Public Utilities," (Laws of Illinois, 52d General Assembly, 1921, page 745 [Cahill's Illinois Statutes, 1923, chapter 111a, section 91; Smith-Hurd Illinois Statutes, 1923, chapter 111-2/3, section 76]):

"When complaint has been made to the Commission concerning any rate or other charge of any public utility and the Commission has found, after a hearing, that the public utility has charged an excessive or unjustly discriminatory amount for its product, commodity or service, the Commission may order that the public utility make due reparation to the complainant therefor, with interest at the legal rate from the date of payment of such excessive or unjustly discriminatory amount.

"If the public utility does not comply with an order of the Commission for the payment of money within the time fixed in such order, the complainant, or any person for whose benefit such order was made, may file in any court of competent jurisdiction a petition setting forth briefly the causes for which he claims damages and the order of the Commission in the premises. Such suit shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the order of the Commission shall be *prima facie* evidence of the facts therein stated. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the action.

"All complaints for the recovery of damages shall be filed with the Commission within two years from the time the product, commodity or service as to which complaint is made was furnished or performed, and a petition for the enforcement of an order of the Commission for the payment of money shall be filed in the

proper court within one year from the date of the order.

"The remedy provided in this section shall be cumulative, and in addition to any other remedy or remedies in this Act provided in case of failure of a public utility to obey a rule, regulation, order or decision of the Commission.

"The Commission shall have power to receive complaints regarding loss or damage occasioned by a public utility, and to make inquiry as to the methods of adjusting such claims. All claims against any public utility for loss of, or damage to property, or for any other loss or damage, in connection with a public utility service, not covered by the preceding paragraphs of this section, if not acted upon within ninety days from the date of the filing of the claim with the public utility, may be investigated by the Commission, in its discretion, and the results of such investigation shall be embodied in a special report which shall be open to public inspection."

Section 118 of "An Act in Relation to Practice and Procedure in Courts of Record", in force July 1, 1907, as amended (Laws of Illinois, 45th General Assembly, 1907, page 467 [Cahill's Illinois Statutes, 1931, chapter 110, section 118; Smith-Hurd Illinois Statutes, 1931, chapter 110, section 118]). Said section is in part as follows:

"Appeals from and writs of error to circuit courts, the superior court of Cook county, the criminal court of Cook county, county courts and city courts, in all criminal cases below the grade of felony shall be taken directly to the Appellate Court, and in all criminal cases above the grade of misdemeanors and cases in which a franchise or freehold or the validity of a statute or a construction of the constitution is involved; and in cases in which the validity of a municipal ordinance is involved and in which the trial judge shall certify that in his opinion the public interest so requires, and in all cases relating to revenue, or in which the State is interested, as a party or otherwise, shall be taken directly to the Supreme Court. * * *"

Section 121 of said Practice Act, as amended by Act of June 21, 1929 (Laws of Illinois, 45th General Assembly,

1907, page 468; Laws of Illinois, 56th General Assembly, 1929, page 578 [Cahill's Illinois Statutes, 1931, chapter 110, section 120; Smith-Hurd Illinois Statutes, 1931, chapter 110, section 120]). Said section is in part as follows:

> "In all cases in which their jurisdiction is invoked pursuant to law, except those wherein appeals and writs of error are specifically required by the Constitution of the State to be allowed from the Appellate Courts to the Supreme Court, the judgments or decrees of the Appellate Courts shall be final, subject, however, to the following exceptions: [1] In case a majority of the judges of the Appellate Court or of any branch thereof shall be of opinion that a case (regardless of the amount involved) decided by them involves a question of such importance, either on account of principal or collateral interests, as that it should be passed upon by the Supreme Court, they may in such cases grant appeals to the Supreme Court on petition of parties to the cause, in which case the said Appellate Court shall certify to the Supreme Court the grounds of granting said appeal. [2] In any such case as is hereinbefore made final in the said Appellate Courts it shall be competent for the Supreme Court to require, by *certiorari* or otherwise, any such case to be certified to the Supreme Court, for its review and determination with the same power and authority in the case, and with like effect, as if it had been carried by appeal or writ of error to the Supreme Court: • • •"

Statement.

The Appellate Court of Illinois, First District, affirmed a judgment entered by the Circuit Court of Cook County, Illinois, in the amount of $42,428.09 plus court costs, including $2,000.00 allowed as attorneys' fees, entered by said Circuit Court in favor of respondent, Illinois Brick Company, and against petitioner, Pennsylvania Railroad Company. Respondent sued on an award of reparation granted it by the Illinois Commerce Commission against Pennsylvania Railroad Company and Pittsburgh, Cincin-

nati, Chicago & St. Louis Railroad Company. The award of the Commission was based on alleged unreasonableness and discrimination in the rates charged respondent by said two railroad companies for shipments of common brick over their lines from Bernice, Illinois, to Illinois points within the Chicago Switching District, between October 28, 1920, and February 15, 1922. The ground of the alleged unreasonableness and discrimination was that the rates in question, which had previously been the same as rates from certain nearby points, were, during the period for which reparation was awarded, raised much higher than the rates from said nearby points.

Bernice is located about two miles outside the limits of the Chicago Switching District (R. 80). The limits of the said switching district were not otherwise defined either before the trial court (R. 20; 194-266), or before the Commission (R. 72-110). The said rates from Bernice were compared by the Commission with the rates from points inside the switching district to intrastate destinations within the switching district (R. 44-46).

Prior to June 25, 1918, the rate on common brick from Bernice to destinations on the same railroad within the switching district was 25c per ton (R. 44). The same rate prevailed on shipments of common brick between intrastate points within the district (R. 44). On June 25, 1918, General Order Number 28 of the Director General of Railroads became effective (R. 44). That order provided that interstate and intrastate freight rates generally should be raised 25%, but provided specifically that the rate on brick should be raised 2c per one hundred pounds, or 40c per ton (R. 76). General Order Number 28 also provided that in applying rates, fractions should be disposed of as follows: Amounts of 5c or greater, but less than 10c, to be increased to 10c. Thereby the rates from Bernice to points within the switching district and the rates between points

within the switching district were raised to 70c per ton (R. 44).

On October 19, 1918, Freight Rate Authority 1887, issued by the Director General of Railroads, became effective (R. 44). This order changed the advance on brick moving between points within the switching district from 2c per hundred pounds, or 40c per ton, to an increase of 25% over the rates prevailing prior to June 25, 1918, but left the rates from points without the switching district to points within the switching district as they were (R. 76-77). Thereby, the rate on brick from Bernice to destinations within the switching district remained 70c, whereas the rates from points within the district to destinations within the district became 30c (R. 44-45).

Respondent Illinois Brick Company took the matter of this difference in rates up with the various carriers serving the yards outside the switching district with a view of having the rates from points outside the district to points within the district reduced to a parallel with the rates inside the district, *i. e.*, from 70c per ton to 30c per ton (R. 77). The carriers filed petitions with the rate committees for permission to do this, and these petitions were approved by the rate committees but were denied by the Director General of Railroads (R. 77).

The rates of 70c and 30c, respectively, remained in effect on February 29, 1920, the effective date of the Transportation Act, 1920. By Section 208 (a) of that Act the existing rates on both intrastate and interstate freight were continued in effect "until thereafter changed by state or federal authority * * *." It was provided by said Section that before September 1, 1920, such rates should not be reduced without approval by the Interstate Commerce Commission.

On July 29, 1920, an order of the Interstate Commerce

Commission in *Ex Parte* 74, 58 Int. Com. Rep. 220 (R. 281-300), was entered, effective August 26, 1920. This order raised the interstate rates from and to points in Illinois by 40% over the rates then prevailing (R. 89). On August 10, 1920, the Illinois Public Utilities Commission (predecessor of Illinois Commerce Commission) entered an order in its case 10620, authorizing a general increase of intrastate freight rates in Illinois by 33⅓% (7 Illinois Pub. Ut. Com. Rep. 1047) (R. 216). Pursuant to this order the Pennsylvania Railroad Company and the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company established a rate of 93½c on brick from Bernice to Illinois points within the Chicago Switching District, and a rate of 40c between Illinois points within the Chicago Switching District (R. 113). By supplement to this order, the Illinois Public Utilities Commission in November, 1920, authorized an increase of 35%, instead of 33⅓%, as previously ordered (8 Illinois Pub. Ut. Com. Rep. 31). This supplement increased the said rate of 93½c to 94½c, and increased the said rate of 40c to 40½c (R. 45).

Part of the Chicago Switching District is within the State of Illinois, and part is in Indiana (R. 117). Therefore, there were in effect two rates between points within the switching district, one interstate and one intrastate. There also were in effect two rates between Bernice and points within the switching district, one interstate and one intrastate. The higher rate in each case was established for interstate commerce by the 40% increase in *Ex Parte* 74 (R. 296). The lower rate in each case was established for intrastate commerce by the 35% increase granted by the Illinois Public Utilities Commission in the supplement to case number 10620. On January 11, 1921, the Interstate Commerce Commission in *Re Intrastate Rates within the State of Illinois,* Docket 11703, 60 Int. Com. Rep. 92 (R. 218-236), entered an order requiring the said railroads, together with

others, to raise intrastate freight rates in Illinois 40% over the level in effect prior to July 29, 1920, the date of the entry of the order of the Interstate Commerce Commission in *Ex Parte* 74. The effect of the order in Docket 11703 was to raise intrastate freight rates in Illinois to the level of the interstate freight rates established in *Ex Parte* 74 (R. 46). By virtue of said order in Docket 11703, the rate on brick from Bernice to Illinois points within the switching district was increased from 94½c to 98c, and the rate between Illinois points within the switching district was increased from 40½c to 42c (R. 46).

Respondent herein brought a proceeding entitled *Illinois Brick Company* v. *Director General, as Agent, Pennsylvania Railroad, Western Lines*, Docket 11317, 64 Int. Com. Rep. 273 (R. 116-129), before the Interstate Commerce Commission, seeking reparation on account of the rate of 70c per ton charged on shipments of brick from Bernice to interstate and intrastate points within the Chicago Switching District since June 25, 1918. The Interstate Commerce Commission restricted its decision to shipments from Bernice to *interstate* destinations within the switching district, and held that a rate of 70c per ton on such shipments was not unreasonable, but that the rate should not exceed the interstate rates between points within the switching district by more than 10c per ton (R. 125). In spite of the fact that the rate from Bernice to interstate points within the district had exceeded the interstate rates between points within the district by 40c per ton during the entire period in question, reparation was refused. (R. 125). The effective date of the new rates was set for February 16, 1922, the day after the period for which reparation is sought in the instant case ends (R. 128).

On February 16, 1922, after the entry of this order, petitioner and the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company reduced their rates on brick from Ber-

nice to both interstate and intrastate points within the switching district to 50¢ per ton (R. 46; 90).

On October 28, 1922, Illinois Brick Company filed its petition for reparation, which is the basis of the instant case, before the Illinois Commerce Commission (R. 20-27). By said petition Illinois Brick Company sought reparation from Pennsylvania Railroad Company and Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company because of alleged unreasonable and unjustly discriminatory rates between Bernice, Illinois, and intrastate destinations within the Chicago Switching District from October 28, 1920, to February 15, 1922. After a hearing, the Commission entered an order on November 7, 1923 (R. 42-49). In that order the Commission first found that the plants of the Illinois Brick Company at Bernice, Illinois, compete with other brick plants located in the Chicago Switching District for business in the Chicago market (R. 43); that the products of some of the brick plants in the Chicago Switching District undergo no railroad transportation, as their product is delivered by team or truck (R. 43-44); and that the most important competition that the plants outside the district meet appears to be with the plants at Blue Island and Riverdale (R. 44). The Commission then reviewed the history of the rates, and the various rate orders which have heretofore been set forth (R. 44-46). After concluding this review, the Commission stated that it would be observed from the history of the rates that the parity between the brick producing plants had been seriously disturbed, and that it was not until after the Interstate Commerce Commission entered its order in Docket 11317 (*Illinois Brick Company, et al.* v. *Director General, as Agent, et al.*) that the parity of the rates was restored (R. 46). The Commission further found that the distances involved from the plants within the district range from 13 to 22 miles, and from the plants outside of the district, 21 to 30 miles (R.

46). The Commission stated that the disturbance of the parity arose by reason of the increase ordered by the Director General of 40c per ton on brick instead of 25%; that it apparently was not anticipated that the switching rates for the transportation of brick should be increased by 40c as other switching rates were only increased 25%; that this is borne out by the fact that on October 19, 1918, the Railroad Administration authorized a reduction in switching rates from 40c to 25%; and that at this time apparently no consideration was given to the relationship in the rates here considered nor to the competitive conditions (R. 47). On the basis of the foregoing statements the Commission concluded as follows (R. 47-48):

> "The defendants in their effort to justify the rates attacked introduced a cost study. Making all due allowances for the disputed items of cost, it is clear that the rate of 30 cents per ton does not produce sufficient revenue to pay operating expenses. It is also clear from the cost study that the rate of 50 cents per ton for single line application at the time the shipments here under consideration moved, provides adequate revenue for the transportation of brick from Bernice, Illinois, to points of destination within the Chicago switching district and intermediate points covered by this complaint.
>
> "We find that to the extent that the rates here complained of exceed by more than 10 cents per ton the rates contemporaneously applied between points within the Chicago switching district, the rates from Lansing, Illinois, were unjustly discriminatory.
>
> "Giving due consideration to the development of all of the rates from all brick producing plants within the Chicago switching district and points immediately beyond the said switching district, the services performed and the conditions under which such services were performed we find that the complainant has been damaged to the extent that the charges assessed are greater than the charges that would have been assessed had the said charges been predicated on a rate of 50 cents per ton, minimum 60,000 pounds per car."

The Commission accordingly ordered that the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company and the Pennsylvania Railroad Company severally file with the Commission, within 60 days, a statement of reparation due under the findings (R. 48); and that the Commission reserve jurisdiction for the purpose of entering an order awarding reparation for charges collected in excess of the rates found to be free from discrimination (R. 49).

No appeal was taken from this order by the railroad companies.

On December 31, 1923, the Illinois Brick Company filed statements purporting to show the reparation due. The statements showed reparation due from the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company of $7,095.82 (R. 60), and from the Pennsylvania Railroad Company of $21,869.90 (R. 70). No further proceedings were had until the order of the Commission entered April 16, 1924 (R. 71-72).

In the order of April 16, 1924, the Commission found that on November 7, 1923, it had entered its report, findings and order and reserved jurisdiction for the purpose of awarding reparation for charges collected in excess of rates found to be just and reasonable in said order; that a statement certified by the Auditor of the Pennsylvania Railroad Company had been filed which showed the amount of reparation to be $28,965.72; that the amount of reparation due was stipulated to be the amount due; that complainant was entitled to reparation in said amount for excessive freight charges collected from it by Pennsylvania Railroad Company and the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company (now Pennsylvania Railroad Company) (R. 7). It was therefore ordered that Pennsylvania Railroad Company and the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company (now Pennsylvania Railroad Company) were directed to pay to

complainant before May 1, 1924, $28,965.72 and interest, on account of unreasonable rates (R. 71-72).

As above stated, the Commission found on November 7, 1923, that it was clear from the cost study of the defendants that a rate of 50c per ton at the time the shipments moved provided adequate revenue (R. 47). The only evidence in the record as to cost was the cost study mentioned and this cost study did not support the conclusion reached. One of the defendant's witnesses was an expert who had made the cost study of the costs of moving this freight (R. 103-110). He described the method by which the cost study was made up (R. 103-108). The cost study formula was received in evidence (R. 134-188). The witness concluded from his study that the terminal cost was 44.4 cents per ton (R. 108). To this he applied an operating ratio of 66⅔% to take care of omitted expenses, taxes, interest on indebtedness, etc., making a total cost of 66.6 cents per ton (R. 108). He further gave as his opinion that the road haul cost from Bernice would be 30 cents per ton, although this was not based on the cost study (R. 108). No attempt was made on cross examination to show that the cost figures were incorrect (R. 109-110). The cost study, as interpreted by the witness, therefore stands as undisputed evidence that the cost of moving the freight in question was more than 96.6c per ton, and thus greatly in excess of the rate of 50c per ton fixed by the Illinois Commerce Commission.

The defendant railroads did not pay the amount of the reparation, and Illinois Brick Company filed suit on the award against both railroad companies in the Circuit Court of Cook County, Illinois, pursuant to Section 72 of the Illinois Public Utilities Act, which authorizes suits on awards of reparation (Cahill's Illinois Statutes, chapter 111a, section 91; Smith-Hurd's Illinois Statutes, chapter 111⅔, section 76.)

Defendant railroad companies filed with their pleas of nonassumpsit and not guilty, pursuant to the state practice, a notice of special defenses, which stated, among other things, that the rates in question were published and collected by them in obedience to an order entered January 11, 1921, by Interstate Commerce Commission in number 11703 (*Re Intrastate Rates within the State of Illinois*) (R. 16), and "that Illinois Commerce Commission is without jurisdiction or authority to penalize said defendants or to award damages or reparation against them for their said acts pursuant and in obedience to said order of Interstate Commerce Commission and that this court is likewise without such jurisdiction and authority;" (R. 17). Defendants also relied in said notice of special defenses on the decision of the Interstate Commerce Commission in number 11317 (*Illinois Brick Company, et al.*, v. *Director General, as agent, et al.*). (R. 15-16).

On the trial before the court without a jury, Illinois Brick Company introduced the complete record before the Illinois Commerce Commission (R. 20), and certain other evidence not here material (R. 194-210; 237-244; 247-265). Defendant introduced certified copies of the order of the Illinois Commerce Commission in number 10620, which authorized the raising of the intrastate rates 33⅓% (R. 210-217), to which order was attached a copy of the report of the Interstate Commerce Commission in *Ex Parte* 74, authorizing the raising of Illinois interstate rates 40% (R. 281-300); and the opinion and order of the Interstate Commerce Commission in *Re Intrastate Rates in the State of Illinois*, Docket 11703 (R. 217-236).

Rulings of the Courts Below.

The trial court overruled defendants' motion to find the issues for defendants at the close of plaintiff's evidence (R. 210), and at the close of all the evidence (R. 266); and denied defendants' motion in arrest of judgment (R. 19). The court permitted plaintiff to dismiss the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company as a party defendant (R. 266). It found the issues for the plaintiff (R. 267), and entered judgment against the Pennsylvania Railroad Company alone, for $28,673.02, plus interest, making a total of $42,428.09, plus costs, including an attorneys' fee of $2,000.00 (R. 269). Defendant Pennsylvania Railroad Company excepted to the foregoing orders, finding and judgment (R. 269).

Pennsylvania Railroad Company appealed to the Illinois Supreme Court on the ground that constitutional questions were involved, pursuant to Section 118 of the Illinois Statute, "An Act in Relation to Practice and Procedure in Courts of Record", as amended, (Cahill's Illinois Statutes, 1931, chapter 110, section 118; Smith-Hurd's Illinois Statutes, 1931, chapter 110, section 118). (R. 269). Pennsylvania Railroad Company assigned error on the grounds that the finding, judgment, and orders of the trial court imposed an unlawful burden on interstate commerce in violation of Section 8, Article I, of the Constitution of the United States (R. 270); deprived Pennsylvania Railroad Company of property without due process of law in violation of Section 1 of the 14th Amendment (R. 270); denied it the equal protection of the laws in violation of said 14th Amendment (R. 270); deprived it of its rights under Section 8 of Article I of the Constitution of the United States (R. 271); that the Interstate Commerce Commission having assumed jurisdiction over the rate in question, the Illinois Commerce Commission's action in awarding repara-

tion was unlawful and void and the judgment of the court approving said action was error (R. 271); that the Illinois Commerce Commission did not have jurisdiction or power to award reparation when to do so it was required to change or reduce a rate previously approved by it (R. 272); and that the evidence before the Illinois Commerce Commission did not warrant its findings (R. 272).

The Supreme Court of Illinois found that the case had been wrongfully appealed to that court and, without filing an opinion, ordered that the case be transferred to the Appellate Court of Illinois, First District (R. 303). By the entry of this order the Supreme Court of Illinois necessarily held that the constitutional questions urged had not been properly raised in the court below, although no such finding appears of record. On oral argument of the case before the Supreme Court of Illinois the Chief Justice thereof stated that the case would be transferred to the Appellate Court of Illinois, First District, because of the Pennsylvania Railroad Company's failure to properly raise and preserve in the trial court the constitutional questions urged in the Supreme Court. Three days after the oral argument, the Pennsylvania Railroad Company moved the Supreme Court to file a written opinion, or oral opinion reduced to writing and filed in the case, stating the reasons why the case was transferred to the said Appellate Court. The Supreme Court of Illinois refused to consider said motion or permit it to be filed.

The Appellate Court of Illinois, First District, in its opinion, held that the order of the Illinois Commerce Commission, entered November 7, 1923, finally determined the "just and reasonable" rate, "past and future"; that it was "legislative" in character and appealable; and that since defendant had not appealed, defendant was precluded under Section 68 of the Illinois Public Utilities Act (Cahill's Illinois Statutes, chapter 111a, section 87; Smith-

Hurd's Illinois Statutes, chaper 111½, section 72) from contesting the order of November 7, 1923 on the merits in a suit based on the subsequent reparation award of April 16, 1924 (R. 319). The court also said that, nevertheless, it had examined the evidence and thought it sufficient to sustain the findings, and had examined the findings and held the same justified the order for reparation (R. 319). It held that the reports and orders of the Interstate Commerce Commission in *Illinois Brick Company, et al.* v. *Director General, as Agent, et al.*, Docket 11317; *Ex Parte* 74; and *Re Intrastate Rates Within the State of Illinois*, Docket 11703, did not preclude the Illinois Commerce Commission from awarding reparation in this case (R. 317). It held that the order of the Illinois Public Utilities Commission in Docket 10620 did not preclude the award of reparation (R. 317). It, therefore, affirmed the judgment of the trial court (R. 306). Pennsylvania Railroad Company filed a petition for rehearing which the Appellate Court denied, but the court ordered that the opinion be "slightly modified" (R. 306-307). The record does not disclose how the opinion was modified. The petition for rehearing did not set up any constitutional questions, since under Section 118 of the Illinois Statute, "An Act in Relation to Practice and Procedure in Courts of Record", as amended, (Cahill's Illinois Statutes, 1931, chapter 110, section 118; Smith-Hurd's Illinois Statutes, 1931, chapter 110, section 118), the Appellate Court of Illinois had no jurisdiction over constitutional questions.

Pennsylvania Railroad Company petitioned the Supreme Court of Illinois for a writ of certiorari to the Appellate Court, pursuant to the provisions of Section 121 of said Practice Art, (Cahill's Illinois Statutes, 1931, chapter 110, section 120; Smith-Hurd's Illinois Statutes, 1931, chapter 110, section 120). Pennsylvania Railroad Company assigned as error the constitutional grounds assigned as error

on the first appeal as hereinbefore stated, and in addition assigned as error that the Appellate Court's holding that Pennsylvania Railroad Company should have appealed, and because of its failure to appeal Section 68 of the Illinois Public Utilities Act prevented review of the sufficiency of the findings and evidence before the Illinois Commerce Commission, denied Pennsylvania Railroad Company due process of law in violation of Section 1 of the 14th Amendment to the Constitution of the United States, and imposed an unlawful burden on interstate commerce in violation of Section 8, Article I, of the Constitution of the United States (Appendix, p. 49). The Supreme Court of Illinois denied the petition for a writ of certiorari without filing an opinion (R. 308), thereby making the judgment of the Appellate Court of Illinois, First District, final under said Section 121. Pennsylvania Railroad Company then filed its petition in the Supreme Court of the United States for a writ of certiorari to the Appellate Court of Illinois, First District.

REASONS FOR GRANTING PETITION.

I. The Appellate Court of Illinois held in this case that the Illinois Commerce Commission could award reparation on Illinois intrastate shipments, although the Interstate Commerce Commission in *Re Intrastate Rates in the State of Illinois, Docket* 11703, 60 Int. Com. Rep. 92 (R. 218-236), had ordered defendant to increase all Illinois intrastate freight rates for the period in question to the same extent interstate rates were increased in *Ex Parte* 74 (an Interstate Commerce Commission order), and defendant had done so (R. 45-46). This Court, in *Railroad Commission of Wisconsin* v. *Chicago, Burlington and Quincy Railroad Company,* 257 U. S. 563, 66 L. Ed. 371, 42 S. Ct. 232, held that when the Interstate Commerce Commission had ordered carriers to increase all intrastate passenger rates to the same extent interstate passenger rates were increased in *Ex Parte* 74, such carriers might enjoin the state commission and state officials from interfering with fares so increased. The decision of the state court is probably not in accord with that applicable decision of this court. The precise issue here, relating to the power of the state commission to award reparation on rates directed by the Interstate Commerce Commission, presents a Federal question of substance not heretofore decided by this court. The authority and construction of Sections 13 and 15a of the Interstate Commerce Act, Section 208a of the Transportation Act, 1920, and the commerce clause of the Federal constitution are involved.

II. The Appellate Court of Illinois held in this case that a general order of the Illinois Public Utilities Commission authorizing intrastate rates to be raised by a certain percentage over pre-existing rates did not prevent its successor, the Illinois Commerce Commission, from awarding

reparation on a specific rate, for the period said authorized increase was in effect, sufficient not only to eliminate the increase, but also to reduce the rate below said pre-existing rate. There were no decisions in Illinois courts prior to the present proceedings giving the Illinois Commerce Commission such power. Whether a state commission may thus overthrow rates lawfully established, and take away money lawfully collected years before, without taking property without due process of law in violation of the Fourteenth Amendment and imposing an unlawful burden on interstate commerce, presents a Federal question of substance not heretofore decided by this court.

III. The Appellate Court of Illinois said in this case that it had examined the evidence before the Commission and thought it sufficient to sustain the findings. (R. 319). The Commission found that Pennsylvania Railroad Company and Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company had introduced a cost study, and that it was clear "from the cost study" that a rate of 50 cents per ton for single line application provides adequate revenue for the movement in question (R. 47). It made no findings questioning any of the elements of cost in the cost study. The undisputed testimony of the railroads' expert witness, based on the said cost study, was that the cost of moving the freight in question exceeded 96.6 cents per ton. There was no further evidence, either contrary or otherwise, as to the cost of moving the freight. This court in *Northern Pacific Railway Company* v. *Department of Public Works of Washington,* 268 U. S. 39, 69 L. Ed. 836, 45 S. Ct. 412, held that an order fixing railroad rates, entered by an administrative tribunal and based on a finding made without evidence or upon evidence which clearly does not support it, is an arbitrary act against which courts afford relief and is a denial of due process. The decision of the state

court is probably not in accord with that applicable decision of this court.

IV. The Appellate Court of Illinois has in effect overruled the previous decision in Illinois, which held that no appeal lay from an order of the Illinois Commerce Commission awarding reparation. By such decision of the Appellate Court petitioner has been denied an opportunity to be heard by the courts on the sufficiency of said Commission's findings and the evidence before it in this case. In *The Terminal Railroad Association of St. Louis* v. *The Public Utilities Commission,* 304 Ill. 312, 136 N. E. 797, the Supreme Court of Illinois held, prior to the hearing before the Illinois Commerce Commission in this case, that appeal to the courts lay only from *final* orders of the Illinois Public Utilities Commission (now Illinois Commerce Commission), and that an award of reparation was not such a final and appealable order, because in a suit on the award the carrier is free to open the entire record and procure a judgment of the court in its favor. In the instant case the Appellate Court of Illinois has held that petitioner should have appealed from the order of the Illinois Commerce Commission entered November 7, 1923, finding the rates attacked discriminatory and reserving jurisdiction to award reparation, and by failing to do so it has waived the right to be heard on the merits (R. 319). The Appellate Court admitted that under *The Terminal Railroad Association* case, *supra,* the final order of April 16, 1924, was not appealable, but held that the interlocutory order of November 7, 1923, was appealable. At the time of the Appellate Court's decision, the time for appeal from the Commission had long expired. This court in *Brinkerhoff-Faris Trust & Savings Company* v. *Hill,* 281 U. S. 673, 74 L. Ed. 1107, 50 S. Ct. 451, held that when a state court originally holds that the state tax commission has no jurisdiction to correct inequality of taxes, and a taxpayer in reliance on

that decision fails to apply to said commission for relief, a subsequent decision by the court that the commission does have such jurisdiction, and the taxpayer has no right in equity because of his failure to apply to the commission, denies said taxpayer due process of law. The decision of the state court is probably not in accord with that applicable decision of this court.

CONCLUSION.

For these reasons it is respectfully submitted that this petition should be granted.

FREDERIC D. MCKENNEY,
FRANK J. LOESCH,
EDWARD M. BURKE,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. .....

PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

vs.

ILLINOIS BRICK COMPANY.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINION BELOW.

One opinion was delivered by the Appellate Court of Illinois, First District. No opinion was delivered by the Supreme Court of Illinois, either on the first appeal or on petition for writ of certiorari to the Appellate Court of Illinois, First District. The opinion of the Appellate Court of Illinois, First District, is not reported but is set forth in full in the Record, pages 310 to 322.

JURISDICTION.

The jurisdiction of this court is invoked under Section 237(b) of the Judicial Code, as amended by the act of February 13, 1925, c. 229 (43 Stat. 937 (28 U. S. C. A., section 344)). The judgment of the Appellate Court of Illinois, First District, which is here sought to be reviewed, was entered December 24, 1934. (R. 305-306). Petition for rehearing was denied January 28, 1935 (R. 306-307). Petition to the Supreme Court of Illinois for a writ of certiorari to review the judgment of said Appellate Court was denied by said Supreme Court April 16, 1935 (R. 308). Petition to the Supreme Court of the United States for writ of certiorari was filed within ~~three months after April 16, 1935~~ statutory period as extended July 11th 1935 (R. 324)

The petition involves the correctness of the decision of the Appellate Court of Illinois, First District, and the validity of orders of the Illinois Commerce Commission entered November 7, 1923, and April 16, 1924, in the case of *Illinois Brick Company* v. *Pennsylvania Railroad Company and Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company* Case No. 12765; the validity of section 68 of "An Act Concerning Public Utilities"; and the validity of section 72 of said Act. Said orders of the Illinois Commerce Commission found reparation due and awarded reparation. They are too long to be set forth here, but appear in full in the Record (R. 42-49; 71-72). Said section 68 provides for appeals from the Illinois Commerce Commission, and the relevant parts of said section are set forth in the petition, p. 6. Said section 72 provides for suits on awards of reparation by said Commission, and is set forth in the petition, p. 7.

The decision of the Appellate Court of Illinois, First

District, was by the highest state court in which a decision could be had. Petitioner attempted to appeal directly from the trial court to the Supreme Court of Illinois, the highest state court, but said Supreme Court refused to hear the case and transferred it to the Appellate Court of Illinois, First District (R. 303). The Appellate Court then entered judgment affirming the trial court (R. 306). Petitioner could not then appeal to the Supreme Court of Illinois as of right but could only (a) petition the Supreme Court of Illinois for a writ of certiorari, or (b) petition the Appellate Court for a certificate of importance and appeal to the Supreme Court, under the governing Illinois statute (section 121 of "An Act in Relation to Practice and Procedure in Courts of Record," in force July 1, 1907, as amended, Petition, p. 8-9). Petitioner sought a writ of certiorari from the Supreme Court of Illinois, but the writ was denied (R. 308). This denial made the decision of said Appellate Court final under said section 121 of "An Act in Relation to Practice and Procedure in Courts of Record," as amended. This court has decided that under the Illinois practice petitioner had done everything necessary, and was not obligated also to petition for certificate of importance and appeal. *Chesapeake & Ohio Railway Company* v. *Mihas*, 280 U. S. 102, 74 L. Ed. 207, 50 S. Ct. 42.

The construction of Federal statutes involved in Question 1 (Petition, p. 2), and discussed in Point I of the brief (Brief, p. 37) is properly before this court. Petitioner, by notice of special defense, which was proper pleading under the Illinois practice (*Hunter* v. *Troup*, 226 Ill. App. 343), contended in the trial court that the rates in question were published and collected by petitioner in obedience to the order of the Interstate Commerce Commission in No. 11703; that Illinois Commerce Commission was without jurisdiction or authority to penalize petitioner or to award damages or reparation against it for

its said acts pursuant and in obedience to said order of Interstate Commerce Commission; and that the trial court was likewise without such jurisdiction or authority (R. 16-17). Petitioner also introduced in evidence before the trial court the report and order of the Interstate Commerce Commission in said No. 11703, entitled *Re Intrastate Rates Within the State of Illinois* (R. 217-237). The Appellate Court of Illinois referred to said Interstate Commerce Commission proceeding, Docket 11703, in its opinion (R. 314), and held that plaintiff (meaning Illinois Brick Company) was not precluded from recovering reparation by any prior order of the Interstate Commerce Commission (R. 317). This holding necessarily drew in question the construction and effect of said order of the Interstate Commerce Commission; the construction and effect of sections 13 and 15a of the Interstate Commerce Act, under the authority of which the Commission acted; and the construction and effect of section 208(a) of the Transportation Act, 1920, which continued in effect the rates on which the Interstate Commerce Commission based its order. Reference to a rate schedule filed with the Interstate Commerce Commission for justification of charges has been held by this court to set up a Federal right. *Atchison, Topeka & Santa Fe Railway Company* v. *Robinson*, 233 U. S. 173, 58 L. Ed. 901, 34 S. Ct. 556. Judgment for the plaintiff, Illinois Brick Company, could not have been sustained by said Appellate Court without deciding that said order of the Interstate Commerce Commission and said Federal statutes did not prevent its jurisdiction; and the Appellate Court did so decide.

The questions arising under the Federal constitution stated in Questions 1, 2 and 3 (Petition, p. 2) and discussed in Points I, II and III of the brief (Brief, p. 37ff), were properly raised in the trial court in accordance with the existing Illinois practice and with the decisions of this

court. They were properly assigned as error on the first appeal to the Supreme Court of Illinois (R. 270-275). They were again properly assigned as error on the petition to the Supreme Court of Illinois for writ of certiorari (Appendix, p. 49ff). In transferring this case to the Appellate Court of Illinois, the Supreme Court of Illinois evaded the constitutional questions by departing from its previous decisions as to the proper method of raising such questions in the trial court, as will be hereafter shown.

Whether the Federal constitutional questions were properly raised in the trial court is itself a Federal question, and this court is not concluded by the view taken by the state court. (*First National Bank* v. *Anderson*, 269 U. S. 341, 346; 70 L. Ed. 295, 302; 46 S. Ct. 135, 137). Such constitutional questions were not waived by acquiescing in the transfer of the case to the Appellate Court of Illinois, instead of attempting to appeal to this court (*Prudential Insurance Company* v. *Cheek*, 259 U. S. 530, 66 L. Ed. 1044, 42 S. Ct. 516).

It is sufficient that the validity of the Illinois Commerce Commission orders was "drawn in question" in the trial court; it need not be "specially set up or claimed." See Judicial Code, Sec. 237 (28 U. S. C. A. Sec. 344). The Illinois Appellate Court has held the order of the Illinois Commerce Commission, here involved, to be "legislative in character" (R. 319), and such orders are state statutes within the meaning of section 237 of the Judicial Code (*Live Oak Water Users' Association* v. *Railroad Commission*, 269 U. S. 354, 70 L. Ed. 305, 46 S. Ct. 149). This court has recognized and enforced the distinction between questions of the validity of state statutes, which need only be "drawn in question," and constitutional rights not concerning the validity of statutes, which must be "specially set up or claimed." (*Columbia Water Power Company* v. *Columbia Electric Street R. L. & P. Company*, 172 U. S. 475, 488; 43 L. Ed. 521, 525; 19 S. Ct. 247, 251-252.)

The Federal constitutional question under the commerce clause (Petition, Question 1, p. 2; Brief, Point I, p. 37) was inevitably drawn in question here because Illinois Brick Company's declaration in the trial court (R. 2-15) was based on the reparation order of the Illinois Commerce Commission, and petitioner's plea thereto stated that because of the Interstate Commerce Commission's decision in Docket 11703 the Illinois Commission was "without jurisdiction or authority" to award reparation (R. 17). Petitioner also introduced a copy of the report and order in said Docket 11703 in evidence (R. 217-236). The Illinois Supreme Court has held that in a suit on a bond to stay execution, given pursuant to the provisions of a statute, a plea that the court was "without power or jurisdiction" to stay said execution was sufficient to raise the constitutionality of the statute. (*Moses* v. *Royal Indemnity Company*, 276 Ill. 177, 114 N. E. 554). This court has held that reference by a party in his pleading to Federal laws, and an allegation that the state legislature "had not power" to prescribe the party's duties, sufficiently raised the validity of the state statute (*Waite* v. *Dowley*, 94 U. S. (4 Otto) 527, 24 L. Ed. 181). Petitioner assigned error on appeal to the Supreme Court of Illinois on the grounds that the judgment of the lower court imposed an unlawful burden on interstate commerce in violation of Section 8, Article I of the Constitution of the United States (R. 270), and that the Interstate Commerce Commission having established a lawful rate for the transportation service, the action of the Illinois Commerce Commission awarding reparation was unlawful and void (R. 271). In holding by the order of transfer (R. 303) that this constitutional question was not properly raised, the Illinois Supreme Court sought to evade the constitutional question.

The Federal constitutional question as to whether the Illinois Commerce Commission might, consistently with

due process of law, in effect overrule its prior decision by awarding reparation on a rate previously approved (Petition, Question 2, p. 3; Brief, Point II, p. 41), was properly raised in the trial court by introducing a copy of the prior decision (Illinois Commerce Commission Case No. 10620, R. 210-217). The prior decision found the rates there established just and reasonable (R. 214), while the reparation order found one of the rates unjust and unreasonable (R. 71). The validity of the second order in relation to the first was thus necessarily "drawn in question." The situation presented is analogous to that in which this court has held that a claim that a state statute constituted a contract, and that a subsequent statute was in violation of the contract, raised a question under the provision of the Federal constitution forbidding impairment of the obligation of contracts, although the Federal constitution was not mentioned (*Bridge Proprietors* v. *The Hoboken L. and I. Co.*, 68 U. S. (1 Wall) 116, 17 L. Ed. 571; *Furman* v. *Nichol*, 75 U. S. (8 Wall.) 44, 19 L. Ed. 370). The sufficiency of the evidence thus presented was tested by petitioner's motion to find the issues for defendants at the close of all the evidence (R. 266), and by motion in arrest of judgment (R. 268). This court has held that a motion in arrest of judgment may raise a Federal constitutional question, even though the state supreme court does not pass on it. (*Consolidated Coal Company* v. *Illinois*, 185 U. S. 203, 46 L. Ed. 872, 22 S. Ct. 616). Petitioner assigned error on the grounds that the finding, judgment, and orders of the trial court deprived petitioner of property without due process of law, in violation of the Fourteenth Amendment (R. 270), and that the Illinois Commerce Commission did not have jurisdiction or power to award reparation when to do so it was required to change or reduce a rate previously approved by it (R. 272).

The Federal constitutional question as to whether the

Illinois Commerce Commission had retroactively reduced the rate below the cost of transportation, and thus imposed a confiscatory rate and denied petitioner due process of law (Petition, Question 3, p. 3; Brief, Point III, p. 43), was necessarily drawn in question when Illinois Brick Company introduced in evidence the entire record before the Illinois Commerce Commission (R. 20), and petitioner also introduced the entire record in its defense (R. 237). This put in issue the sufficiency of the evidence before the Commission, which was then presented to the court for ruling by petitioner's motion for a finding in its favor at the close of all the evidence (R. 266). Prior to the instant case, the Illinois courts have never held it necessary to preserve the argument in the record to show that constitutional questions were argued to the trial court. The Illinois Supreme Court has many times held that a general demurrer to a declaration raised constitutional questions, when the declaration was based on a statute open to some constitutional objection. *Shepherd* v. *City of Sullivan,* 166 Ill. 78, 46 N. E. 720; *Woodruff* v. *Kellyville Coal Co.,* 182 Ill. 480, 55 N. E. 550; *Chicago, R. I. & P. Ry. Co.* v. *People,* 217 Ill. 164, 75 N. E. 368; *People* v. *Eisen,* 357 Ill. 105, 191 N. E. 219. Objection to evidence offered under an unconstitutional statute was sufficient. *Pearson* v. *Zehr,* 125 Ill. 573, 18 N. E. 204. When suit is brought on a foreign judgment, the Illinois Court holds that the full faith and credit and due process clauses of the Federal constitution are both necessarily involved, so that a demurrer to a replication raises them, though neither replication nor demurrer mentioned the constitution (*Van Dyke* v. *Illinois Commercial Men's Association,* 358 Ill. 458, 193 N. E. 490), even though this court has held that the full faith and credit clause must be pleaded, or the trial court's attention otherwise directed to it (*Louisville and Nashville Railroad Company* v. *Melton,* 218 U. S. 36, 51-52; 54 L. Ed. 921, 927; 30

S. Ct. 676, 679). Petitioner assigned error on appeal on the grounds that the findings, judgment and orders of the trial court deprived it of property without due process of law in violation of the Fourteenth Amendment (R. 270), and that the evidence before the Illinois Commerce Commission did not warrant the findings of ultimate fact of said Commission, and the action of the trial court in effect finding that it did was error (R. 272).

The Federal constitutional question as to whether the Illinois court has so changed the rule governing appeal from reparation orders of the Illinois Commerce Commission that petitioner has been denied a hearing in court on the merits (Petition, Question 4, p. 4; Brief, Point IV, p. 45) was sufficiently raised by assignments of error on petition for certiorari to the Supreme Court of Illinois. Petitioner assigned as error that section 68 of the Illinois Public Utilities Act, when construed by the Appellate Court of Illinois to require appeal from the order of the Commission entered November 7, 1923 in order to have the sufficiency of the evidence to sustain said order reviewed by the court, denied petitioner due process of law in violation of the Fourteenth Amendment (Appendix, p. 49), and imposed an unlawful burden on interstate commerce in violation of Section 8 of Article I of the United States Constitution (Appendix, p. 50). These assignments were clearly sufficient to raise the constitutional questions. The questions were raised in apt time, because the record shows that the trial court did not hold that the sufficiency of the evidence before said Commission was not before it, but passed on the evidence (R. 245), and the constitutional questions therefore did not arise until the Appellate Court's decision. In such circumstances, the constitutional questions may be first raised after the Appellate Court's decision. *Brinkerhoff-Faris Trust & Savings Company* v. *Hill*, 281 U. S. 673, 74 L. Ed. 1107, 50 S. Ct. 451. And al-

though a state court may attempt to prevent review on the merits by holding that a utility has waived its rights by failing to appeal from a commission order finding rates unreasonable and stating that reparation would be awarded, this court has held that in such circumstances it will review the entire case on appeal from the final order of reparation. *New York Central Railroad Company* v. *New York & Pennsylvania Company,* 271 U. S. 124, 70 L. Ed. 865, 46 S. Ct. 447.

THE FACTS.

The facts are stated in the petition, pages 9 to 18, and it is not necessary to repeat them here.

ARGUMENT.

I.

ILLINOIS COMMERCE COMMISSION HAD NO POWER TO AWARD REPARATION ON RATES ESTABLISHED PURSUANT TO ORDER OF INTERSTATE COMMERCE COMMISSION.

This case involves the power of the Illinois Commerce Commission to award reparation on a specific intrastate rate in Illinois collected during a period when all intrastate rates in Illinois were fixed at a certain level pursuant to a general order of the Interstate Commerce Commission.

The Interstate Commerce Commission in *Re Intrastate Rates within the State of Illinois,* Docket 11703, had ordered petitioner "to establish, put in force, and maintain rates and charges for freight services and for the transportation of milk and cream in intrastate commerce within the State of Illinois which shall exceed the rates and charges of the carriers now in force and applicable to such transportation in amounts corresponding to the increases heretofore made by the carriers, now in effect, under *Ex Parte 74,*". The Commission further ordered that the order in Docket 11703 should "remain in force until the further order of this Commission in the premises." (R. 236.)

This court, in *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy Railroad Company,* 257 U. S. 563, 66 L. Ed. 371, 42 S. Ct. 232, has distinguished between orders of the Interstate Commerce Commission fixing intrastate rates, as follows:

(a) Orders based on preference as between persons or localities in intrastate commerce and interstate commerce (Interstate Commerce Act, Sec. 13 (4), first clause; 49 U. S. C. A., Sec. 13 (4).). Since the authority arises only from

preferences as to specific persons or localities, the order based thereon is effective only insofar as such specific preferences are found by the Interstate Commerce Commission to exist. *American Express Company* v. *South Dakota ex rel. Caldwell,* 244 U. S. 617, 61 L. Ed. 1352, 37 S. Ct. 656, *Illinois Central Railroad Company* v. *Public Utilities Commission of Illinois,* 245 U. S. 493, 62 L. Ed. 425, 38 S. Ct. 170.

(b) Orders based on discrimination against interstate commerce as a whole (Interstate Commerce Act, Sec. 13 (4), second clause, and Sec. 15a (2); 49 U. S. C. A., Sec. 13 (4) and 15a (2)). This power is for the benefit of the carriers, and enables the Commission to raise intrastate rates under Sec. 13 (4) to enable the carriers to earn a fair return under Sec. 15a (2) (as said section read prior to the amendment of June 16, 1933), even though the Commission does not make specific findings of discrimination on all rates. It is sufficient for the Commission to find generally that intrastate rates increased under this power will be reasonable, since to require it to find on each individual rate would prevent effective action. *United States* v. *Louisiana,* 290 U. S. 70, 75-76; 78 L. Ed. 181, 185-186; 54 S. Ct. 28, 31.

The orders of the Interstate Commerce Commission here involved, namely, *Ex Parte 74,* 58 Int. Com. Rep. 220, and *Re Intrastate Rates within the State of Illinois,* Docket 11703, 60 Int. Com. Rep. 92, were entered under the second power above mentioned, to permit the carriers to earn a fair return, and to prevent discrimination against interstate commerce as a whole.

The authority of a state commission after the entry of such an order is the question here. The state commission may seek to evade the order in one or more of the following ways:

(1) It may seek to maintain the pre-existing level of in-

trastate rates as a whole. Such action is clearly indefensible. The state commission will be enjoined therefrom on suit of the interested railroads (*Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy Railroad Company,* 257 U. S. 563, 66 L. Ed. 371, 42 S. Ct. 232); and the state commission will be denied an injunction against enforcement of the rates prescribed by the Interstate Commerce Commission (*New York* v. *United States,* 257 U. S. 591, 66 L. Ed. 385, 42 S. Ct. 239).

(2) It may seek to order prospective reductions of individual intrastate rates. Such reductions recognize the paramount authority of the Interstate Commerce Commission, and may be permissible because they do not penalize the carrier for obedience to its order, and because they permit supervision by the Interstate Commission if necessary. However, whether or not a state commission has such power is not in issue here, because the order of the state commission here complained of is not a legislative order fixing rates, but is a semi-judicial order awarding reparation.

(3) It may seek to award reparation on individual intrastate rates. This is the instant case. This court has never, so far as we can determine, expressed itself on this point directly. By inference, however, such assumed power in the state commission has been denied. The injunction granted in *Railroad Commission* v. *Chicago, Burlington & Quincy Railroad Company, supra,* would be wholly ineffective if the state commission could later nullify it piecemeal by awarding reparation.

It may be the law that a state commission has the power to establish a *prospective* intrastate rate in one or a few instances different than that established by the Interstate Commerce Commission, because such action would be subject to the control of the Interstate Commerce Commission, since it could enter another order directly affecting

the specific rates fixed by the state commission; but to permit a state commission to award *reparation* based on a lower rate than that established by a mandatory order of the Interstate Commerce Commission cannot be permitted, because the Interstate Commerce Commission can exercise no power over the order of the state commission awarding reparation, that being a quasi-judicial order. In the analogous situation where the Interstate Commerce Commission assumes jurisdiction over intrastate rates formerly controlled by the state commission, "the substituted schedule is prospective only, and power has not been granted in such circumstances to give reparation for the past." *Atlantic Coast Line Railroad Company* v. *Florida*, ... U. S. .....; 79 L. Ed. (Adv.) 719, 723; 55 S. Ct. 713, 717.

The case of *Eagle Cotton Oil Company* v. *Southern Railway Company*, 46 F. (2d) 1006, reversed 51 F. (2d) 443, certiorari denied, 284 U. S. 675, 76 L. Ed. 571, 52 S. Ct. 130, is not in point here. The Circuit Court of Appeals there held only that where certain *interstate* rates were *permitted* to be charged by general orders of the Interstate Commerce Commission, the same Commission was not prevented from awarding reparation. The present case differs from the one cited in two important respects: (a) Here we deal with an intrastate rate, and the question is of the power of the *state* commission to disregard the order of the *interstate* commission, not the power of the Interstate commission to amend its own order. (b) Here the rate was mandatory, whereas in the Eagle Cotton Oil Company case it was only permissive. This distinction is vital in determining what the carrier is entitled to expect.

We submit that the question presented involves one of the most important relations of the Federal system of control to the state system, and should therefore be decided by this court.

II.

ILLINOIS COMMERCE COMMISSION HAD NO POWER TO AWARD REPARATION ON RATES PREVIOUSLY AUTHORIZED BY IT.

The question of whether the Illinois Commerce Commission had power to award reparation on that part of the rates here in question which were established by a mandatory order of the Interstate Commerce Commission was considered under the preceding point.

In this point we deal with the question whether the Illinois Commerce Commission had power to award reparation on that part of the rates here in question which were previously authorized by it.

This court has held that the Interstate Commerce Commission has no such power (*Arizona Grocery Company* v. *Atchison, Topeka & Santa Fe Railway Company*, 284 U. S. 370, 76 L. Ed. 348, 52 S. Ct. 183), although this decision was rested solely on statutory, not constitutional, grounds (*Great Northern Railway Company* v. *Sunburst Oil & Refining Company*, 287 U. S. 358, 362; 77 L. Ed. 360, 365; 53 S. Ct. 145, 148.) The overwhelming majority of state courts have likewise held that their state commissions have no such authority. The question had not been passed on in Illinois until the decision in the instant case, many years after the charges were made.

The question here presented was not foreclosed by this court in *Great Northern Railway Company* v. *Sunburst Oil & Refining Company*, 287 U. S. 358, 77 L. Ed. 360, 53 S. Ct. 145. The decision there, permitting award of reparation on an approved rate, was based squarely on the fact that the state court, prior to the time the charges were collected, had stated that reparation could be awarded on an approved rate. This court pointed out that the state court's decision had written into the statute a notice

that authorized payments were subject to refund, and this construction entered into the contract of carriage at its inception. There was no such decision and no such notice in Illinois.

Nor does *Eagle Cotton Oil Company* v. *Southern Railway Company*, 51 F. (2d) 443, certiorari denied, 284 U. S. 675, 76 L. Ed. 571, 52 S. Ct. 130, determine the answer to the present question. Denial of certiorari, of course, did not approve the lower court's opinion, but only the result. The *Eagle Cotton Oil Company* case necessarily decided only that the general increase of rates authorized by the Interstate Commerce Commission in *Ex Parte 74* was subject to reparation *to the extent of the increase there authorized.* It did not decide that the pre-existing rate, established by the Director General, and continued in force by Sec. 208 (a) of the Transportation Act, 1920, was subject to retroactive reduction. The Interstate Commerce Commission in *Ex Parte 74* reserved jurisdiction to reduce the rate only to the extent of the increase there authorized (R. 300). In the instant case, on the other hand, the state court has decided that the rates here in question were subject to reduction, not only to the extent of the increase authorized by the Illinois Commerce Commission in its general rate order, Docket 10620, but also below the rate established by the Director General, and continued in effect by said Section 208 (a). Yet the Illinois Commerce Commission in Docket 10620 also reserved jurisdiction to reduce only the increases authorized in that order (R. 215). In short, in the *Eagle Cotton Oil Company* case, the Interstate Commerce Commission and the court awarded reparation within the limits of the reservation of jurisdiction in *Ex Parte 74;* in the instant case, the Illinois Commerce Commission and the state court exceeded the reservation of jurisdiction in Docket 10620, and retroactively reduced the pre-existing rate.

Furthermore, it appears from the opinion of the Circuit Court of Appeals in the *Eagle Cotton Oil Company* case that the court construed *Brimstone R. & Canal Co.* v. *United States,* 276 U. S. 104, 72 L. Ed. 487, 48 S. Ct. 282, as holding that Ex Parte 74 did not authorize any particular rate, and was therefore subject to reparation. Such holding was, of course, a part of the carrier's contract, as in the *Sunburst Oil & Refining Company* case, and made that contract subject to subsequent alteration.

We submit that the security of the railroad rate structure requires that the carrier know as exactly as possible when rates lawfully collected may subsequently be held unlawful by the same commission, and that this court should grant certiorari herein in order to determine whether or not the Fourteenth Amendment to the Constitution of the United States, or the commerce clause of the United States Constitution, have been violated.

III.

THE RATE FIXED BY THE ORDER HERE INVOLVED IS CONFISCATORY.

The Appellate Court of Illinois, First District, has approved the order of reparation entered by the Illinois Commerce Commission and sued on in this case, although the undisputed evidence before said Commission and before the court showed that the net rate thus retroactively established was much lower than the cost of moving the freight. An alternative ground of decision, that petitioner had waived the right to object to inadequacy of evidence, will be discussed hereafter in Point IV.

This question involves consideration of the facts before the Illinois Commerce Commission and the lower court, but this court will review the decision of a state court on a question of fact when a federal right has been denied as the result of a finding wholly unsupported by evidence.

Northern Pacific Railway Company v. *North Dakota ex rel. McCue,* 236 U. S. 585, 59 L. Ed. 735, 35 S. Ct. 429.

The Appellate Court said that it had examined the evidence before the Illinois Commerce Commission and thought it sufficient to sustain the findings (R. 319). It thus necessarily held that the order of the Commission did not establish a confiscatory rate.

The Commission found that Pennsylvania Railroad Company and Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company had introduced a cost study, and that it was clear "from the cost study" that a rate of 50 cents per ton for single line application provides adequate revenue for the movement in question (R. 47). It made no findings questioning any of the elements of cost in the cost study. The undisputed testimony of the railroads' expert witness was that, if all costs were included, the cost of moving the freight in question would exceed 96.6 cents per ton. Details of this evidence are stated in the Petition, p. 17.

This Court, in *Northern Pacific Railway Company* v. *Department of Public Works of Washington,* 268 U. S. 39, 69 L. Ed. 836, 45 S. Ct. 412, held that an order fixing railroad rates entered by an administrative tribunal, and based on a finding made without evidence, or upon evidence which clearly does not support it, is an arbitrary act against which courts afford relief, and is a denial of due process. This Court has further held that a rate so established is confiscatory, whether or not the railroad earns a reasonable profit on its intrastate business as a whole. *Vandalia Railroad Company* v. *Schnull,* 255 U. S. 113, 65 L. Ed. 539, 41 S. Ct. 324.

The decision of the Court below is in conflict with these applicable decisions of this Court, and should be reviewed.

IV.

THE STATE COURT HAS DENIED PETITIONER AN OPPORTUNITY TO BE HEARD ON THE MERITS OF THIS CASE AND HAS THEREFORE DENIED PETITIONER DUE PROCESS OF LAW.

The question here presented is whether a state court may overrule its previous decision as to the proper method of obtaining a review in the courts of an order of the state commerce commission, under such circumstances that a utility is denied all opportunity of such review.

Section 68 of the Illinois statute, "An Act Concerning Public Utilities", in force July 1, 1921, (Cahill's Illinois Statutes, Chapter 111a, Section 87; Smith-Hurd's Illinois Statutes, Chapter 111-2/3, Section 72) (Petition, p. 6) provided, at the time of the proceedings before the Illinois Commerce Commission which are here involved, that within thirty days after the service of an order of the Commission refusing a rehearing, or within thirty days after the service of any *final order* of the Commission after a rehearing, any person affected may appeal to the state circuit court. Said section further provided that when no appeal is taken, parties affected shall be deemed to have waived the right to have the merits of said controversy reviewed by a court.

The Supreme Court of Illinois in *The Terminal Railroad Association of St. Louis* v. *The Public Utilities Commission*, 304 Ill. 312, 136 N. E. 797, decided October 21, 1922, prior to the proceedings before the Illinois Commerce Commission here involved, had construed Section 68 of "An Act to Provide for the Regulation of Public Utilities", in force January 1, 1914, with reference to appeals from reparation proceedings before the Illinois Public Utilities Commission. Said Commission was the predecessor of the Illinois Commerce Commission, and exercised practically identical powers of regulation, including the power to award reparation. Section 68 of the earlier act provided for appeal from an order of said Public Utili-

tion Commission made after a *final hearing*. It was thus in substance the same as Section 68 of the present Act.

The Illinois Supreme Court held in the case cited that appeal from the Public Utilities Commission to the courts, under Section 68 of "An Act to Provide for the Regulation of Public Utilities", lay only from *final orders* of said Commission. The court by construction thus gave the prior Act identical meaning with the present one in this respect. The court further held that an award of reparation by the Commission was not a final and appealable order, because (the court said) in a suit on the award the carrier is free to open the entire record and procure a judgment of the court in its favor. It necessarily followed from the decision that the only way in which a utility ordered to pay reparation could secure a judicial review of such order was to await suit on the award and then present its defense. No other review was provided by the Act.

Relying on this decision, petitioner permitted the order of the Illinois Commerce Commission, finding reparation due to respondent and reserving jurisdiction to determine the amount, to be entered against it November 7, 1923, and the further order awarding reparation to be entered against it April 16, 1924, without seeking an appeal. (See Petition, p. 14ff, *supra,* for further details of said orders). That this was proper is evidenced by the fact that up to the present time no further attempt to obtain direct review of reparation orders appears in the reports of the Illinois Courts of review. The decision in *The Terminal Railroad Association* case will still be considered authority by all utilities, because the Appellate Court's opinion in the present case has not been designated by it for publication.

After the time within which appeal could be taken had expired, respondent brought the present suit on the award, and contended for the first time on appeal that petitioner should have appealed from the preliminary order of November 7, 1923. The Appellate Court of Illinois sustained

this contention, and held that by failing to appeal petitioner had waived its right to have the merits of the present controversy reviewed by the courts (R. 319).

The Appellate Court also said that it thought the evidence sufficient to sustain the award (R. 319), but the opinion shows this to be a secondary ground of decision. This secondary ground, furthermore, cannot sustain the award, for the undisputed evidence shows the rate established to be confiscatory, as shown in Point III, above. Both alternative grounds of decision, therefore, raise constitutional questions and are before this court for review.

This court in *Brinkerhoff-Faris Trust & Savings Company* v. *Hill,* 281 U. S. 673, 74 L. Ed. 1107, 50 S. Ct. 451, held that when a state court originally holds that the state tax commission has no jurisdiction to correct inequality of taxes, and a taxpayer in reliance on that decision fails to apply to said commission for relief, a subsequent decision by the court that the commission does have such jurisdiction, and the taxpayer has no right in equity because of his failure to apply to the commission, denies said taxpayer due process of law. This case is in principle identical with the Brinkerhoff-Faris case.

In *New York Central Railroad Company* v. *New York & Pennsylvania Company,* 271 U. S. 124, 70 L. Ed. 865, 46 S. Ct. 447, the state commission had found certain railroad rates unreasonable, and stated that upon presentation of a petition and data, it would award reparation. Reparation was afterwards awarded and the railroads appealed. The state court held that the railroads had waived their rights by failing to appeal from the earlier decision of the commission. This court said that failure to appeal from the former order was no bar, and that it would not be reasonable to hold the railroads precluded from getting the protection this court owed them by having failed to go as far as they now learn they might have gone in a previous state proceeding which did not infringe their rights and which could not be brought to this court. So in the

instant case, the attempt of the state court to prevent review on the merits is not reasonable, and cannot prevent this court from reviewing the case on constitutional grounds.

The decision of the state court is not in accord with these applicable decisions of this court. To prevent denial of hearing amounting to denial of due process, this court should review the instant case.

CONCLUSION.

Petitioner respectfully submits that the award of reparation entered by the Illinois Commerce Commission, and approved by the Illinois courts in this case, disregards the paramount authority of the Interstate Commerce Commission and jeopardizes the effectiveness of the protection afforded to the railroads by mandatory orders of the Interstate Commerce Commission fixing intrastate rates; that said award raises the question of the power of a state commission, consistently with due process of law, to disregard its previous orders, upon which railroads have lawfully relied; that the reparation award has imposed upon petitioner, a carrier in interstate commerce, a confiscatory rate; and that the Appellate and Supreme Courts of Illinois, by overruling in effect the prior Illinois decision, have attempted to prevent petitioner from obtaining a hearing in the courts on the merits of said reparation award. All of the foregoing matters raise questions of constitutional and federal law more far reaching than the limits of the instant case.

Respectfully submitted,

FREDERIC D. MCKENNEY
FRANK J. LOESCH
EDWARD M. BURKE,
Counsel for Petitioner.

APPENDIX.

The following are the relevant parts of Pennsylvania Railroad Company's Assignments of Error on Petition for Certiorari to the Supreme Court of Illinois, which do not appear in the record because the record remained in the Appellate Court of Illinois, First District:

18. The Appellate Court refused to review the evidence before the Illinois Commerce Commission, because the Appellate Court held in effect that Section 68 of An Act Concerning Public Utilities, as amended, required that Pennsylvania Railroad Company appeal from the order of the Illinois Commerce Commission, entered November 7, 1923, in order to have the sufficiency of the evidence to sustain said order reviewed by the court. As so construed, said Section 68 denies Pennsylvania Railroad Company due process of law in violation of Section 1 of the 14th Amendment to the Constitution of the United States and Section 2 of Article II of the Constitution of the State of Illinois.

19. The Appellate Court refused to review the findings in the order of the Illinois Commerce Commission, entered November 7, 1923, because the Appellate Court held in effect that Section 68 of An Act Concerning Public Utilities, as amended, required that Pennsylvania Railroad Company appeal from the said order in order to have the sufficiency of the findings in said order to sustain the order reviewed by the court. As so construed, said Section 68 denies Pennsylvania Railroad Company due process of law in violation of Section 1 of the 14th Amendment to the Constitution of the United States and Section 2 of Article II of the Constitution of the State of Illinois.

20. The Appellate Court refused to review the evidence before the Illinois Commerce Commission, because the Appellate Court held in effect that Section 68 of An Act concerning Public Utilities, as amended, required that Pennsylvania Railroad Company appeal from the order of the Illinois Commerce Commission, entered November 7, 1923, in order to have the sufficiency of the evidence to sustain said order reviewed by the court. As so construed, said Section 68 imposes an unlawful burden on interstate

commerce in violation of Section 8 of Article I of the Constitution of the United States.

21. The Appellate Court refused to review the findings in the order of the Illinois Commerce Commission, entered November 7, 1923, because the Appellate Court held in effect that Section 68 of An Act concerning Public Utilities, as amended, required that Pennsylvania Railroad Company appeal from the said order in order to have the sufficiency of the findings in said order to sustain the order reviewed by the court. As to construed, said Section 68 imposes an unlawful burden on interstate commerce in violation of Section 8 of Article I of the Constitution of the United States.

22. The order of the Appellate Court affirming the findings, judgment and orders of the trial court impose an unlawful burden on interstate commerce in violation of Section 8 of Article I of the Constitution of the United States.

23. The order of the Appellate Court, affirming the findings, judgment and orders of the trial court, deprived Pennsylvania Railroad Company of property without due process of law, in violation of Section 1 of the 14th Amendment to the Constitution of the United States and Section 2 of Article II of the Constitution of the State of Illinois.

24. The order of the Appellate Court, affirming the findings, judgment and orders of the trial court, denied Pennsylvania Railroad Company the equal protection of the laws, in violation of Section 1 of the 14th Amendment to the Constitution of the United States.

25. The order of the Appellate Court, affirming the findings, judgment and orders of the trial court, deprived Pennsylvania Railroad Company of its rights under Section 8 of Article I of the Constitution of the United States, and Section 1 of the 14th Amendment to the Constitution of the United States.

27. The Interstate Commerce Commission having assumed jurisdiction of and established the rate for the transportation of common brick in carloads from Bernice, Illinois, to points within the Chicago switching district in the State of Illinois, the said action of the Interstate Commerce Commission established a lawful rate for the transportation service and the action of the Illinois Commerce

Commission awarding reparation based on a different rate was unlawful and void, and the order of the Appellate Court affirming the orders, findings and judgment of the trial court which in effect approved the said action of the Illinois Commerce Commission was error.

29. The Illinois Commerce Commission did not have jurisdiction or power to award reparation when to do so it was required to change or reduce a rate previously approved by it, and the Appellate Court erred in entering its order affirming the orders, findings and judgment of the trial court, which in effect approved such action of the Illinois Commerce Commission.